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No. 75-342

In the Supreme Court of the United States

OCTOBER TERM, 1975

FEDERAL POWER COMMISSION, PETITIONER

v.

CONWAY CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) [1] is reported at 510 F. 2d 1264. The initial order of the Federal Power Commision (J.A. 34-42), order amending the prior order (J.A. 47-48), order denying amended petition to intervene (J.A. 52-55), and order denying rehearing (J.A. 65-67) are reported at 50 F.PC 289, 50 F.C. 584, 50 F.P.C. 1293 and 50 F.P.C. 1780, respectively.

[1] "Pet. App." references are to the appendix to the petition for certiorari filed by the Federal Power Commission in No. 75-342. "J.A." references are to the Joint Appendix in this proceeding.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1975 (Pet. App. 24a–25a). On June 27, the Chief Justice extended the time for filing a petition for a writ of certiorari to August 2, 1975. On August 1, the Chief Justice further extended the time for filing a petition for a writ of certiorari to September 1, 1975. The Court granted certiorari on November 11, 1975 (J.A. 68). The Court's jurisdiction rests upon 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S. 8251(b).

QUESTION PRESENTED

Whether the Federal Power Commission properly determined that it lacked authority, in determining whether an electric utility's wholesale rate increase was just and reasonable, to remedy alleged discrimination caused by the utility's retail rates, which are not subject to the Commission's jurisdiction?

STATUTES INVOLVED

Sections 201, 205 and 206 of the Federal Power Act, 16 U.S.C. 824, 824d, and 824e, are set forth in this brief's Appendix, *infra*, pp 44–49.

STATEMENT

This case involves an order of the Federal Power Commission (Commission or FPC), issued in the course of a wholesale electric rate proceeding, which limited the intervention therein of respondent Conway

Corporation, *et al.*[2] (Conway), to matters *other than* the alleged anticompetitive nature of the subject utility's nonjurisdictional retail rates. Upon review, the court of appeals held that the Commission is required to consider the alleged anticompetitive nature of such retail rates and when appropriate, order a reduction in wholesale rates on the basis thereof.

1. THE PROCEEDING BEFORE THE COMMISSION

Arkansas Power & Light Company (APLC) is a "public utility" engaged in "the sale of electric energy at wholesale in interstate commerce", as defined by Sections 201(b) and (e) of the Federal Power Act,[3] 16 U.S.C. 824(b) and (e). Accordingly, APLC's wholesale electric rates are subject to the Commission's authority to establish just and reasonable rates under Sections 205(a) and 206(a) of the Act. On June 1, 1973, APLC filed with the Commission a wholesale rate increase pursuant to Section 205(d) of the Federal Power Act, 16 U.S.C. 824d(d). Public notice of the filing was issued by the Commission on June 15, 1973.

In response to that notice, Conway, *et al.*, wholesale customers of APLC, protested the rate increase and

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[2] The following wholesale customers of Arkansas Power & Light Company, respondents in this proceeding, are collectively referred to as "Conway":

Conway Corporation, Benton Municipal Light and Water Works, Hope Water & Light Commission, City of North Little Rock, City of Osceola, City of Prescott, City of West Memphis, Farmers Electric Cooperative Corporation, Mississippi County Electric Cooperative, Inc.

[3] Hereinafter referred to at times as "the Act".

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sought to intervene in the proceedings before the Commission (J.A. 4–25). Conway also alleged that the filing was made for anticompetitive purposes and stated as follows:

> Insofar as petitioners can ascertain, the sole reason which AP&L has for filing this unilateral rate increase is an attempt to squeeze petitioners or some of them out of competition, and to make them more susceptible to the persistent attempts of the company to take over the publically owned systems in the State. [J.A. 6]

Conway then made certain comparisons of APLC's retail industrial and wholesale rates and argued that the filing was the "result of the obvious price squeeze which AP&L [APLC] has sought to impose without cost basis therefore."[4]

On July 31, 1973, the Commission issued an order which accepted the tariff sheets for filing, suspended their effectiveness for five months and set the matter for hearing to determine the justness and reasonableness of the proposed rate (J.A. 34–42). Regarding respondent's allegations of anticompetitive price squeeze, the Commission noted that in its petition to intervene Conway had failed to specify the relief it sought "which is within this Commission's authority to direct", assuming that the allegations could be proven (J.A. 35). Accordingly, the Commission limited

[4] Like many large utilities, APLC makes sales of electricity both at wholesale for resale (subject to the Commission's jurisdiction) and at retail directly to industrial customers (not subject to the Commission's jurisdiction).

Conway's intervention to matters other than the allegations of anticompetitive conduct resulting from the price squeeze, but invited the respondents to file an amended petition setting forth relief "that is within the Commission's authority to direct" (J.A. 36).

Thereafter, Conway filed an amended petition wherein it urged the Commission "to reduce the proposed rates filed by AP&L to eliminate the anticompetitive price squeeze" (J.A. 45). By order dated October 29, 1973, the Commission concluded that the relief sought was beyond its power to grant (J.A. 53). As the Commission stated:

> The relief sought by Petitioners is beyond the authority granted to us under the Federal Power Act. Under the Federal Power Act this Commission is charged with the responsibility for reviewing rate applications to insure that the rates proposed are just and reasonable.
>
> * * *
>
> Wholesale rates must recover allocated wholesale costs. Customers' suggested relief is a rate related not to wholesale costs but rather related to APLC's industrial rates. However, APLC's industrial rate level and the accounting and rate making principles underlying that rate level is under the sole jurisdiction of the state commission and not the Federal Power Commission. We have no jurisdiction over APLC's industrial rates, and we do not choose to open this hearing to an examination of those rates. Such an action would require a detailed

> analysis of APLC's retail cost of service and would result in this Commission interjecting itself into an area in which it has no jurisdiction.

Since it could provide no remedy under the Federal Power Act, the Commission determined that it could properly dispose of Conway's objections "without a hearing and extended investigation." *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, 762 (J.A. 54).

Conway applied for rehearing of the Commission's October 29, 1973 order (J.A. 56–64). That application was denied on December 5, 1973 (J.A. 65–67). Thereafter, respondents petitioned for review of the Commission's orders in the Court of Appeals for the District of Columbia Circuit.

2. THE COURT OF APPEALS DECISION

Upon review, the court of appeals rejected the Commission's analysis and remanded the case for further proceedings. The court acknowledged that the provisions of Sections 205(b) and 206(a) of the Federal Power Act, 16 U.S.C. 824d(b) and 824e(a) are by their terms limited to a "transmission or sale subject to the jurisdiction of the Commission" (Pet. App. 13a); that is, "the sale of electric energy *at wholesale*" [emphasis supplied], Section 201(b) of the Act, 16 U.S.C. 824(b). The court nevertheless held that the Commission has authority under those provisions to remedy "claims of discrimination between rates for two classes of service, only one of which is 'subject to the jurisdiction of the Commission' " (*Id.*).

While the court below accepted the proposition that the Commission could not order an increase in APLC's retail rates, which the court characterized as having been voluntarily "depress[ed] * * * in order to curb the retail competion of [APLC's] wholesale customers" (*Id.* at 22a–23a), the court nonetheless found that the Commission had authority to modify *the proposed wholesale rate,* if necessary, to relieve the alleged price squeeze (*Id.* at 20a–23a). The court of appeals recognized that the Commission could not approve a wholesale rate which failed to recover properly allocated wholesale costs (*Id.* at 22a). However, the court reasoned that the wholesale and retail rates may both "fall within a zone of reasonableness, yet create a price squeeze between themselves" (*Id.* at 22a). Accordingly, the court concluded that the Commission had authority to limit the wholesale rate to "the lower range of the zone of reasonableness and provide relief" (*Id.*).

SUMMARY OF ARGUMENT

A. The Federal Power Commission's regulatory authority under the Federal Power Act is limited to "the sale of electric energy at wholesale in interstate commerce." See Section 201(b) of the Act, 16 U.S.C. 824(b). As part of the Commission's responsibility to assure just and reasonable wholesale rates, it was empowered under Sections 205(b) and 206(a) of the Act, 16 U.S.C. 824(b) and 824e(a), to proscribe unduly discriminatory differences in such rates. However,

Congress carefully limited this remedial authority in that only with respect to a "transmission or sale subject to [its] jurisdiction" may the Commission adjudicate allegations of discriminatory differences in rates, 16 U.S.C. 824(b) and 824e(a). This legislative intent is manifest from the fact that the above-quoted phrase was inserted in both Sections 205(b) and 206 (a) of the Act, to make clear that the prohibitions contained therein apply only to the granting of undue preferences with respect to services otherwise subject to the Commission's jurisdiction. The prohibited preference must be referable to an improper wholesale rate, whereas the discrimination alleged in this case is the consequence of retail rates allegedly depressed for the purpose of curtailing retail competition. The latter is not subject to the Commission's jurisdiction, and the Commission viewed its authority as so limited in this case as it has at all times in the past.

The court of appeals declined to give the limiting words of Sections 205(b) and 206(a) of the Act their plain meaning. Instead the court held that discrimination caused by allegedly depressed retail rates is subject to the Commission's jurisdiction under those provisions (Pet. App. 22a–23a). While recognizing that the Commission has no authority to adjust retail rates in order to remove their discriminatory aspect, the court concluded that the Commission could reduce otherwise just and reasonable wholesale rates and thereby accomplish the same result. In reaching its conclusion

the court below erroneously relied on this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, for the proposition that the FPC may adjudicate allegations of discrimination in retail rates. On the contrary, in *Panhandle* the Court held that in setting rates for jurisdictional service the Commission must segregate the nonjurisdictional operations of a utility whose activities embrace both, and that the Commission has discretion in selecting the means for determining nonjurisdictional costs.

B. While the primary error underlying the court of appeals decision is its conclusion that the Commission may adjudicate claims of discrimination based on retail rates, in so doing it also incorrectly concluded that as a remedy for such discrimination the Commission can reduce wholesale rates to a lower point within the "zone of reasonableness" (Pet. App. 21a–22a). The Commission's responsibility under Section 205(a) of the Federal Power Act, 16 U.S.C. 824d(a), is to establish rates which enable the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity. The court below ignored the fact that in fulfilling this duty the FPC does not establish a "zone" of possible rates and then select a single rate from that zone. On the contrary, the Commission's responsibility is to determine, based on the cost of wholesale service and with as much exactness as possible, the precise rate level appropriate in a given case. The Commission has no authority to reduce an

otherwise just and reasonable wholesale rate because of allegedly discriminatory nonjurisdictional retail rates.

C. Finally, the Commission's lack of authority to adjudicate claims of discrimination based upon retail rates will not leave respondents without a complete remedy. APLC's wholesale rates are regulated by the FPC, its retail rates by the Arkansas Public Service Commission, and the price squeeze alleged herein, which respondents argue is in violation of the antitrust laws, is cognizable in the federal courts.

ARGUMENT

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO REMEDY AN ALLEGED DISCRIMINATION CAUSED BY A DEPRESSED NONJURISDICTIONAL RETAIL RATE.

A. THE LEGISLATIVE HISTORY AND JUDICIAL INTERPRETATION OF SECTIONS 205(B) AND 206(A) OF THE FEDERAL POWER ACT CLEARLY DEMONSTRATE THAT THE COMMISSION IS WITHOUT AUTHORITY TO RELIEVE AN ALLEGED RATE DISCRIMINATION CAUSED BY UNREGULATED NON-JURISDICTIONAL RETAIL RATES.

1. Under Sections 205 and 206 of the Federal Power Act, 16 U.S.C. 824d and 824e, the Commission has authority to eliminate discrimination between sales which are subject to its jurisdiction. However, the Commission has no authority under the Act to remedy a claim of discrimination between a jurisdictional wholesale rate and a nonjurisdictional retail industrial rate.

Section 201(b) of the Federal Power Act limits the jurisdiction of the Commission to "the *sale of electric energy at wholesale* in interstate commerce," [emphasis supplied] 16 U.S.C. 824(b). Accordingly, Section 205(b), 16 U.S.C. 824(b), prohibits discrimination "with respect to *any transmission or sale subject to the jurisdiction* of the Commission" [emphasis supplied]. That section provides, in part:

> No public utility shall, *with respect to any transmission or sale subject to the jurisdiction of the Commission* * * * maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or classes of service [emphasis supplied].

The policy of Section 205(b) is enforced under the accompanying provisions of Section 206(a), 16 U.S.C. 824e(a), which reads:

> Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility *for any transmission or sale subject to the jurisdiction of the Commission,* or that any rule, regulation, practice, or contract affecting such rate, charge or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order [emphasis supplied].

The claim of discrimination at issue here is caused by allegedly depressed retail rates (Pet. App. 22a–23a). However, it should be carefully noted that the italicized language in both Sections 205(b) and 206

(a) modifies all that follows it and the Commission's authority to remedy the prohibited conduct is thereby limited to situations where it is caused by a wholesale rate otherwise subject to the Commission's jurisdiction. The Commission so viewed its authority in the present case (J.A. 53), and the Commission has always viewed its authority as limited in this manner.[5] While not controlling, this reasonable, consistent and longstanding interpretation by the agency charged with administration of the Federal Power Act is entitled to considerable weight. *United States* v. *National Association of Securities Dealers*, 422 U.S. 694, 719.[6]

Nevertheless, the court of appeals declined to give the words of the statute their plain meaning, arguing instead that if Congress had wanted to limit the Commission's authority to the consideration of discrimination among rates which are the subject of the Commission's jurisdiction, it would have prohibited the maintenance of unreasonable differences in rates "between classes of service subject to the jurisdiction of the Commission" (Pet. App. 15a). However, Section 205(b) already limits the Commission's jurisdiction "to any transmission or sale subject to the jurisdiction of the Commission." Under the reasoning of the court

[5] See *Alabama Electric Cooperative, Inc.* v. *Alabama River Company*, 38 F.P.C. 962, 974–75. See also, *St. Michael's Utility Commission* v. *Eastern Shore Public Service Co.*, 35 F.P.C. 591, 595; *Southwestern Public Service Company*, 33 F.P.C. 343, 346; *Jaspan* v. *Philadelphia Electric Co.*, 1 F.P.C. 561, 565.

[6] Citing, *Saxbe* v. *Bustos*, 419 U.S. 65; *Investment Company Institute* v. *Camp*, 401 U.S. 617; *Udall* v. *Tallman*, 380 U.S. 1.

of appeals, this statutory language would be superfluous. It is clear that the quoted phrase was not inserted in the Act as mere surplusage. On the contrary, as legislative history demonstrates, that language became part of both Sections 205(b) and 206(a) precisely to insure that discrimination caused by nonjurisdictional, retail rates was outside the scope of the Commission's authority under the Act.

The Federal Power Act of 1935 was introduced in Congress as the Wheeler-Rayburn Bill on February 6, 1935.[7] Section 202(c) of the bill, the forerunner of present Section 205(b), when introduced, read as follows:

> No public utility shall, as to rates, charges, services, facilities or in any other respect, make or grant any preference or advantage to any person or subject any person to any prejudice or advantage. No public utility should establish or maintain any unreasonable difference as to rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.[8]

[7] 74th Cong., 1st Sess.; H.R. 5423; S. 1725.

[8] H.R. 5423, p. 103; S. 1725, p. 106. Similarly, Section 208(a) of the Wheeler-Rayburn Bill, the precursor of present Section 206(a) read:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that the rates, charges, or classifications, or any of them, demanded, observed, charged, or collected by any public utility for any service, or in connection therewith, or that the rules, regulations, practices, or contracts, or

(Continued)

Thus, Section 202(c) of the Wheeler-Rayburn Bill prohibited discrimination in terms broad enough to encompass prohibition of discrimination between interstate and intrastate rates. This possibility arose from this Court's earlier decision in *Houston, East & West Texas Ry. Co.* v. *United States* (Shreveport case) 234 U.S. 342. In *Shreveport* the Court interpreted Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1),[9] the language of which is nearly identical to the above-quoted provisions of Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill, and stated as follows (243 U.S. at 356):

> This language is certainly sweeping enough to embrace all the discriminations of the sort described which it was within the power of Congress to condemn. There is no exception or qualification with respect to an unreasonable discrimination against interstate traffic produced by the relation of intrastate to interstate rates as maintained by the carrier.

(Continued)

any of them, affecting such rates, charges, or classifications, or any of them are unjust, unreasonable, discriminatory, or preferential, or in anywise in violation of any provision of law, or that such rates, charges, or classifications are insufficient, the Commission shall determine the just, reasonable, or sufficient rates, classifications, rules, regulations, practices, or contracts, to be thereafter observed and in force, and shall fix the same by order."

[9] Section 3(1) of the Interstate Commerce Act provides:

"It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however*, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

Nevertheless, despite the breadth of language contained in the bill, its draftsmen had intended to give the Commission authority to remedy only discrimination that arose as a consequence of transmissions or sales *otherwise subject* to the Commission's jurisdiction. This intent is demonstrated by the following colloquy between Representative Pettengill of Indiana, a member of the House Committee on Interstate and Foreign Commerce, and Dozier A. DeVane, Solicitor of the Federal Power Commission and a principal draftsman of the Wheeler-Rayburn Bill, respecting the bill as first introduced:

> Mr. PETTENGILL. You say that this bill gives the Power Commission jurisdiction over wholesale energy in interstate transmission.
>
> Mr. DEVANE. Yes.
>
> Mr. PETTENGILL. Suppose the retail or wholesale rates in intrastate are fixed by the State commission, and were so low that for the company to exist it had to charge exorbitant rates for its wholesale interstate business. Then, would not the doctrine of the Shreveport case apply?
>
> Mr. DEVANE. No, sir.
>
> Mr. PETTENGILL. Why not?
>
> Mr. DEVANE. No, sir; if the utility's rates in the State are fixed so low that they result in

confiscation, then the utility in question has its remedy in court.

Mr. PETTENGILL. The railroads in the Shreveport cases have also.

Mr. DEVANE. The interstate rate should be determined upon its reasonableness, its reasonableness without regard to what the intrastate rate is.

Mr. PETTENGILL. That is what it should be.

Mr. DEVANE. And the intrastate rate should be determined upon its reasonableness.[10]

The same intent was expressed by Clyde L. Seavey, then Chairman of the Commission, in testimony on March 7, 1935 before the same House Committee. Mr. Seavey said in regard to Section 208 of the bill, the forerunner of present Section 206(a), as it stood prior to amendment:

> It cannot be too strongly emphasized that the rate-making power conferred upon the Commission by section * * * 208 is limited to the field in which the States have no constitutional authority. Under the provisions of this title, the power of the States to regulate retail distribution rates, even where the energy comes directly from another State, is expressly preserved: *wholesale rates alone are made the subject of the Commission's jurisdiction.* The rate-making provisions in the present bill are designed merely to fill the gap in regulation which results from the inability of the States to fix wholesale rates. [Emphasis supplied] [11]

[10] Hearings on H.R. 5423, before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., p. 503 (March 12, 1935).

[11] *Id.* at p. 386.

The same point is further emphasized in the following exchange between Mr. Seavey and Representative Cole of Maryland, a member of the House Committee on Interstate and Foreign Commerce and one of the sponsors of the Wheeler-Rayburn Bill:

> Mr. COLE. You have drawn very definite comparisons between title II and the existing Interstate Commerce Act. I am wondering if under the authority of the Shreveport case you feel that this title is broad enough to go in and establish local rates.
>
> Commissioner SEAVEY. No.
>
> Mr. COLE. Why not?
>
> Commissioner SEAVEY. Because the provisions in this act clearly limit the power of the Federal Commission as to the wholesale interstate rates.
>
> Mr. COLE. Yes. Did not the Interstate Commerce Act do the same; but the Interstate Commerce Commission claimed that the local rates were so interrelated, and this right to do that was decided in the Shreveport case?
>
> Commissioner SEAVEY. Well, the Interstate Commerce Act has provisions in it that gives the Interstate Commerce Commission the power to fix intrastate rates when they are a burden upon interstate commerce. This act does not give this Commission the power to fix intrastate rates if they are a burden upon interstate commerce rates.
>
> Mr. COLE. But, this title gives the Federal Power Commission jurisdiction over any phase of this problem which in the judgment of the Commission imposes a burden upon interstate commerce, does it not?

Commissioner SEAVEY. No.

Mr. COLE. It is broad enough in my judgment to do that.

Commissioner SEAVEY. That was not the intention, * * *.[12]

Representative Cole noted that in the *Shreveport* case, *supra,* this Court determined that the ICC could modify *intrastate* rates which unduly burdened *interstate* commerce. The *Shreveport* decision was based on the ICC's broad remedial authority under Section 3(1) of its act, 49 U.S.C. 3(1), quoted above,[13] which

[12] *Id.* at 396. Representative Cole's misgivings were twofold. First, as described above, he was troubled by the fact that in light of the *Shreveport* doctrine the Commission might have authority under Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill to modify intrastate rates that unduly burdened interstate commerce. Cole's second concern was that Section 201(a) of the bill might also give the Commission jurisdiction over intrastate rates. In pertinent part, that Section read:

"The provisions of this title shall apply to the transmission and sale of electric energy in interstate commerce and to the production of energy for such transmission and sale, except where such electric energy is sold for use within the State in which it is generated."

Chairman Seavey agreed that "a strict construction of that language would allow the Commission to * * * have some jurisdiction over local rates" (*Id.* at p. 396). He referred to this as an "inadvertence" which should be modified by amending the bill (*Id.* at p. 397). The language was amended and appears in its present form in Section 201(b) of the Act, 16 U.S.C. 824(b), which in pertinent part reads:

"The provisions of the Part shall apply to the transmission of electric energy in interstate commerce *and to the sale of electric energy at wholesale in interstate commerce,* but shall not apply to any other sale of electric energy * * *." [Emphasis supplied.]

[13] Page 14, *supra* n. 9, and accompanying text.

closely resembled the language of Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill. In *Shreveport,* the Court held that despite the jurisdictional limitation of Section 1(2) of the Interstate Commerce Act,[14] the broad, unexceptional language of Section 3(1) of that act gave the ICC authority to modify intrastate rates that discriminated against interstate commerce. Focusing on the comprehensive scope of Section 3(1), the Court concluded:

> *The powers conferred by the act are not thereby limited where interstate commerce itself is involved.* This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, *in view of the * * * comprehensive terms of the* [*Act's*] *provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised* * * * [emphasis supplied].[15]

[14] 49 U.S.C. 1(2)(a), which reads:

The provisions of this chapter shall also apply to such transportation of passengers and property and transmission of intelligence, but only insofar as such transportation or transmission takes place within the United States, *but shall not apply—*

(a) To the *transportation* of passengers or property, or to the receiving, delivering, storage, or handling of property, *wholly within one State* and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this chapter * * * [emphasis supplied].

[15] 234 U.S. at 358–59.

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Accordingly, in response to substantial concern that Sections 202(c) and 208(a) of the Wheeler-Rayburn Bill would have given the FPC the same authority to modify intrastate rates that was given the ICC under Section 3(1) of the Interstate Commerce Act and the *Shreveport* case, the former provisions were deleted from the bill. Amended bills were submitted in both houses of Congress which substituted the language of present Sections 205(b) and 206(a).[16] Thereafter, Representative Cole made the following statement with respect to these amendments:

> As to the jurisdiction of the States and State commissions, I doubt if any State commision or State officials familiar with the bill *as it is now before you* will say that the jurisdiction of the States has not been safeguarded and protected in a fair and lawful way. *In doing so we have tried—and I think successfully—to avoid the injection into the Federal control, which this title confers, the extension thereof into intrastate activities in the way the Shreveport case might permit* [emphasis supplied].[17]

The critical change in language was the insertion in both Sections 205(b) and 206(a) of the phrase providing that only "with respect to any transmission or

[16] See proposed amendments to H.R. 5423, 74th Cong., 1st Sess., dated June 14 and June 22, 1935. Also see proposed amendments to S. 1725 dated May 4, 1935, and S. 2796, May 7, 1935, offered in substitution for S. 1725. S. 2796 was also submitted in the House of Representatives and with amendments not here relevant it became the Federal Power Act on August 25, 1935.

[17] 79th Cong. Rec. 10384, June 28, 1975.

sale subject to [its] jurisdiction" did the Commission have authority to modify discriminatory rates.

2. The discrimination alleged in this case would, if proven, result not from APLC's wholesale rate, but as a consequence retail rates which, according to the court of appeals, the utility has voluntarily depressed (Pet. App. 22a–23a). Thus, while the impact of the wholesale/retail rate differential may be measured by the difference between the two, the alleged discriminatory conduct would result from the depressed *retail* rates (*Id.*). The court below characterized this matter as "the utility's [APLC's] own decision to *depress certain retail revenues* in order to curb the retail competition of its wholesale customers" [emphasis supplied].[18]

Yet as the foregoing legislative history of the Federal Power Act ineluctably demonstrates, the Congress deliberately denied the FPC any authority to effect non-jurisdictional rates. Recognizing on the basis of this legislative history that the FPC could not remedy discrimination by raising "depressed" retail rates causing same (Pet. App. 15a, 22a), the court of appeals nonetheless incorrectly concluded that it was only *that remedy* that the FPC could not provide, and that the Commission did have jurisdiction to reduce wholesale rates in order to remedy alleged discrimination which would result from "depressed" retail rates

[18] Pet. App. 22a–23a.

(Pet. App. 22a–23a).[19] However, contrary to the conclusions of the court of appeals, it was not just the remedy of upward adjustment of depressed retail rates that Congress withheld from the FPC, but rather jurisdiction to remedy discrimination caused by the juxtaposition of *depressed* retail rates and an otherwise proper wholesale rate. This view is fully confirmed by the Senate Report on S. 2796, the substitute bill which became the Federal Power Act. As the report clearly states, only those acts of discrimination

[19] We note in passing that the court of appeals cited (Pet. App. 17a–19a) various provisions of the Federal Power Act which involve the Commission in consideration of non-jurisdictional matters. *E.g.*, Section 206(b), 16 U.S.C. 824e(b) (authority to investigate nonjurisdictional sales); Section 209(b), 16 U.S.C. 824h (b) (the FPC's authority to confer with a State commission regarding the rates of a utility subject to the jurisdiction of both); Section 311, 16 U.S.C. 825j (authority to investigate the generation, distribution, etc., of electric energy even where not subject to the Commission's jurisdiction). Despite its reference to these provisions, the court below recognized that none of them give the FPC authority to remedy abuses by changing nonjurisditcional rates.

In this regard, the court (*Id. at* 19a) also refers to *Southwestern Public Service Co.*, 33 F.P.C. 343. In *Southwestern* the issue was whether a lower wholesale rate to rural electric cooperatives as opposed to other wholesale customers, a difference not based on cost of service, was undue discrimination. In that case the utility had offered cooperatives the lower rate in order to retain them as customers. On the other hand, this reduced fixed costs to the utility's remaining customers—a benefit that would have been lost but for the lower rate to cooperatives. In finding that the cooperatives' rate was not unduly discriminatory the Commission considered evidence of whether that rate competitively disadvantaged other wholesale customers, and found that it did not (*ibid.* at pp. 350–51). However, the Commission did not review that evidence for the purpose of reducing jurisdictional wholesale rates.

A related case is *Florida Gas Transmission Co.*, Op. No. 611, 47 F.P.C. 341, 366–67, cited by Conway in its brief opposing certiorari (p. 7) and initial brief below (pp. 19–20). The interruptible rate there in question was not, as Conway implies, imposed by the Commission. It was voluntarily offered by the utility, without objection from its remaining customers, so that interruptible gas service would be competitive with other fuels. This in turn reduced the fixed cost burden upon the utility's remaining customers—a benefit that would otherwise have been lost, Op. No. 611–A, 49 F.P.C. 261, 263–64.

referable to a jurisdictional wholesale rate come within the provisions of Section 205(b):[20]

> Subsection (b) prohibits the granting of undue preferences or advantages to any person with respect to any service subject to the jurisdiction of the Commisison.

Obviously, a preference caused by a non-jurisdictional rate, such as the depressed retail rate in this case, is not subject to the Commission's jurisdiction under Section 205(b) and 206(a) of the Federal Power Act. This view is confirmed by Mr. Justice Jackson's concurring opinion in *Colorado Interstate Gas Co.* v. *FPC,* 324 U.S. 581, 615, where it was stated with respect to Sections 4(b) and 5(a) of the Natural Gas Act, 15 U.S.C. 717c(b) and 717d(a),[21] the verbatim

[20] See S. Rep. No. 621, 74th Cong. 1st Sess. 51 (1935).

[21] Decisions interpreting these parallel provisions of the Natural Gas Act are applicable to interpretation of Sections 205(b) and 206(a) of the Federal Power Act. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 346–47; *Municipal Light Boards* v. *FPC*, 450 F. 2d 1341, 1347 (C.A.D.C.).

counterparts of Sections 205(b) and 206(a) of the Federal Power Act:

> * * * [The] Act forbids discrimination only as between regulated rates and does not forbid discriminations between the regulated and unregulated ones.[22]

In rejecting the Commission's interpretation of the jurisdictional limitations of Sections 205(b) and 206 (a), the court of appeals misinterpreted this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *FPC*, 324 U.S. 635, decided the same day as *Colorado Interstate, supra.* In *Panhandle* the Commission had ordered a natural gas company to reduce its wholesale rates. Panhandle's business was almost exclusively wholesale and subject to the Commission's rate

[22] In its reply brief below (at p. 16), Conway seemingly criticized use of the quoted statement because of Mr. Justice Jackson's additional statement that the jurisdictional limitation did not preclude reference to a "fairly bargained selling price as a standard of what is a 'just and reasonable' price," and that comparison of the former with the regulated price could be "a basis" for reducing the latter, 324 U.S. at 615. However, the rate reductions ordered in *Colorado Interstate*, which Justice Jackson fully supported, "were measured *solely* by the excess revenues over costs *in the regulated business*", 324 U.S. at 588 [emphasis added]. Moreover, of course, Conway *did not* offer evidence of APLC's retail rates in order to impeach the credibility of the cost of service presentation supporting APLC's wholesale rate filing, but rather to seek reduction of the wholesale rate because it exceeded the retail rate.

In this regard, also note that Conway's reference in its brief opposing certiorari (pp. 6–7) to *Otter Tail Power Company*, 2 F.P.C. 134, 149, *Gulf States Utilities Co.*, 1 F.P.C. 522 and *Wisconsin-Michigan Power Co.*, 31 F.P.C. 1445, begs the question under consideration above, because in each of those cases the issue was discrimination between *wholesale* rates.

jurisdiction; however, the company had a few direct industrial customers. The Court noted that as a general rule "the Commission must make a separation of the regulated and unregulated business when it fixes the interstate wholesale rates of a company whose activities embrace both," 324 U.S. at 641. However, Panhandle had never built any gas plant to serve its nonjurisdictional industrial customers, all of whom were subject to interruption when necessary to satisfy wholesale demands. Moreover, its entire business was operated as a single unit. On its books Panhandle made no segregation of costs or profits as between classes of service, and its president testified that any attempt to allocate costs would be "unrealistic" and "not practical", 324 U.S. at 640. On the other hand, it was agreed that some division of profit between the two classes had to be made lest the regulated business be saddled with costs fairly attributable to direct industrial sales.

Therefore, rather than make a formal cost allocation, the Commission apportioned to the wholesale business all earnings above a certain percentage. The Court concluded that the Commission's judgment as to fair allocation of earnings was a proper exercise of its discretion, and that no formal cost allocation was necessary "under the exceptional circumstances of this case", 324 U.S. at 642. As the Court stated:

> We do not mean to imply that such concessions would warrant a departure of the Commission from the statutory scheme of regulation. The issue is a much narrower one. The

> Commission did not undertake to fix industrial rates. The Commission, as was its duty, merely determined what earnings were properly allocable to the unregulated business. Petitioner disagrees with the result. The use of a formula for an allocation of costs or a segregation of property might or might not have been more favorable to petitioner. But once the use of such formula is waived or is conceded to be impractical or theoretical, there must be some discretion in the Commission to make that determination through the exercise of its informed judgment. We cannot say that the Commission abused its discretion * * *.

Expressly recognizing that *Panhandle* was clearly distinguishable from the present case (Pet. App. 18a), the court of appeals nevertheless concluded that the "underlying principle" of *Panhandle* permits the Commission to consider matters otherwise nonjurisdictional "when germane to the meaningful execution of a jurisdictional function." We need not quarrel with that general proposition to recognize that the court of appeals begged the question in asserting that *Panhandle* supported the FPC's authority to remedy a discrimination between jurisdictional and non-jurisdictional rates. To be sure *Panhandle* supports the FPC's authority to review non-jurisdictional matters when relevant to a jurisdictional function, it does not however support the expansion of FPC's jurisdiction to remedy alleged discrimination caused by a "depressed" non-jurisdictional rate. Thus, the court of

appeals ignored the essential rationale of *Panhandle*, which is that in order to properly set rates for jurisdictional service the Commission necessarily had to segregate nonjurisdictional operations from the integrated whole. That was the limit of the Commission's consideration of nonjurisdictional matters in *Panhandle* and under the Court's decision nothing more would be permissible.

In clear contrast is the present case. The issue here is *not* whether evidence of retail costs may be considered when determining the properly allocated wholesale cost of service. On the contrary, the present issue is whether the Commission has authority to order a reduction in otherwise just and reasonable wholesale rates because of APLC's allegedly anti-competitive, depressed retail rates (Pet. App. 22a–23a). *Panhandle* offers no support for that proposition, and, as we explain below, under Sections 205(b) and 206(a) of the Federal Power Act the Commission has no authority to make such a reduction in otherwise just and reasonable rates.[23]

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[23] Conway also argued in its reply brief below (pp. 14–16) and in its brief opposing the petition for certiorari herein (pp. 7–8) that even if the Commission were correct in its analysis of Sections 205(b) and 206(a), the Commission would nevertheless be required under Sections 19 and 20 of the Federal Power Act, 16 U.S.C. 812 and 813, to remedy discrimination resulting from an alleged price squeeze. The latter provisions apply to persons, including AP&L, who operate hydroelectric projects licensed by the Commission. Although this argument was made below, it was not addressed in the circuit court's opinion.

(Continued)

B. THE RELIEF ORDERED BY THE COURT BELOW IS INCONSISTENT WITH THE COMMISSION'S RESPONSIBILITY TO ASSURE JUST AND REASONABLE WHOLESALE ELECTRIC RATES.

1. The Commission's responsibility to assure "just and reasonable" wholesale electric rates derives from Section 205(a) of the Federal Power Act, 16 U.S.C. § 824d(a).[24] The Commission's responsibility in this

(Continued)

The fallacy of Conway's argument in this regard is that Sections 19 and 20 authorize the Commission to remedy a licensee's discriminatory rate practices *only* where no state agency has authority to do so. *Louisville Gas & Electric Co.* v. *FPC*, 129 F. 2d 126, 132 (C.A. 6), certiorari denied, 318 U.S. 761. However, the State of Arkansas has a public service commission with ample authority to prohibit such discrimination. *FPC* v. *Southern California Edison Co.*, 376 U.S. 205, cited by Conway for the proposition that states can not regulate wholesale rates, is irrelevant because in remedying such discrimination the state would not be required to reduce wholesale rates. Where the utility has voluntarily maintained depressed retail rates for the purpose of curbing competition within the state, an increase in the state controlled rate can be ordered. Thus, states are not without constitutional authority to remedy such discrimination (see n. 11, *supra*, p. 16, and accompanying text).

The fact that the state commission may be reluctant to increase the overall cost of service to its citizens in order to protect the competitive position of some only serves to emphasize a point discussed below, *i.e.* Conway should seek relief from the alleged price squeeze in the federal courts.

[24] Section 205(a) provides:

"All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

The "just and reasonable" rate standard of Section 205(a) and the nonpreference standard of Section 205(b) are both enforced under the provisions of Section 206(a).

regard is to establish rates which enable the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity.[25] The Commission's inquiry in this regard is a carefully circumscribed economic determination made on the basis of costs.

Nevertheless, the court of appeals, while acknowledging that cost of service is the Commission's guidepost in exercise of its ratemaking function, erroneously relied on *Gulf States Utilities Co.* v. *FPC*, 411 U.S. 747, and this Court's interpretation therein of the "public interest" standard contained in Section 204 of the Federal Power Act, as a basis for ordering rate reductions under Section 206(a) of the Act (Pet. App. 20a).[26] Under Section 204, 16 U.S.C. § 824c, utilities must obtain the Commission's approval before issuing new securities. In *Gulf States* the Court held that allegations of anticompetitive conduct were proper for

[25] *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 605.

[26] In its brief opposing the petition for certiorari herein (pp. 4–5), initial brief below (pp. 16–17) and petition for rehearing (J.A. 60–61), Conway refers to pp. 7, 12, 13–15 and 19 of the Commission's brief to this Court in *Gulf States*. By this reference Conway seems to attribute to the FPC the conclusion that it had jurisdiction to remedy the price squeeze complained of here. The Commission, of course, said no such thing. On the contrary, what the Commission said is that under certain provisions of the Federal Power Act it has authority to consider antitrust allegations and fashion relief when necessary. However, the Commission's authority in this regard is limited, *cf.*, *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, 375, it cannot remedy all anticompetitive conduct regardless of form. See also, *Northern California Power Agency* v. *FPC*, 514 F. 2d 184, 187.

consideration under Section 204's "public interest" standard. The Court's opinion emphasizes the Commission's broad powers under Section 204 and the varied and flexible remedies to the Commission if such allegations were proven. As the Court explained (411 U.S. at 756):

> The mandate that § 204 of the Federal Power Act, 16 U.S.C. § 824c, imposes upon the Commission is a broad and impressive one. Section 204(a) empowers the Commission to authorize the issue of a security by a public utility *only* "if it finds that such issue . . . is for some lawful object, within the corporate purposes of the applicant and compatible with the public interest."
>
> *In making its determination under § 204(a), the Commission is given broad powers of inquiry and enforcement.* By § 204(b) it may hold hearings on the application, may grant the application "in whole or in part," may modify it, and may impose such terms or conditions "as it may find necessary or appropriate." * * * Section 204(c) grants the Commission authority to specify the purpose to which the proceeds of the security may be applied and the amount allowed for that purpose [emphasis supplied].[27]

[27] Thus, when at a later point the Court makes a general reference to the Commission's "broad regulatory power" as including consideration "*in appropriate circumstances*" of the "anticompetitive effects of *regulated aspects* of interstate utility operations." [emphasis supplied] 411 U.S. at 758–59, the Court is again addressing situations where the Commission's authority under the particular statute involved is broad enough to (1) include consideration of the anticompetitive conduct complained of and (2) fashion a meaningful and effective remedy.

Accordingly, the Commission gives full consideration to antitrust allegations in wholesale rate proceedings where the issue is properly raised and where appropriate relief is within the Commission's authority to grant. See, *e.g.*, *Wisconsin Public Service Corp.*, 54 F.P.C. —, Docket No. E–8867, order issued October 21, 1975; *Public Service Co. of Indiana*, 53 F.P.C. —, Docket No. E–8556, order issued March 17, 1975; *Northern States Power Co.*, Docket No. E–9155, order issued February 5, 1975 (unreported); *Virginia Electric and Power Co.*, 53 F.P.C. —, Docket No. E–9147, order issued January 22, 1975; *Boston Edison Co.*, 52 F.P.C. —, Docket Nos. E–8187 and E–8700, order issued September 25, 1974; *Carolina Power & Light Co.*, 52 F.P.C. 399; *Southwestern Public Service Co.*, 51 F.P.C. 2426; *Pacific Gas & Electric Co.*, 51 F.P.C. 1030; *Carolina Power & Light Co.*, 49 F.P.C. 645; *Kentucky Power Co.*, 49 F.P.C. 564; *Mississippi Power Co.*, 45 F.P.C. 269; *Georgia Power Co.*, 35 F.P.C. 436, affirmed, *sub nom. Georgia Power Co.* v. *F.P.C.*, 373 F.2d 485 (C.A. 5).

The Court underscored the breadth of the public interest standard "as embodied in Section 204," 411 U.S. at 758. The Court stated (411 U.S. at 759):

> *Under the express language of § 204 the public interest is stressed as a governing factor. There is nothing that indicates that the meaning of that term is to be restricted to financial considerations,* with every other aspect of the public interest ignored. Further, there is the section's requirement that the object of the issue be lawful. The Commission is directed to inquire into and to evaluate the purpose of the issue and the use to which its proceeds will be put. Without a more definite indication of contrary legislative purpose, we shall not read out of § 204 the requirement that the Commission consider matters relating to both the broad pur-

poses of the Act and the fundamental national economic policy expressed in the antitrust laws. [emphasis supplied]

In contrast to the Court's conclusions in *Gulf States* regarding the Commission's "broad powers of inquiry and enforcement" under the statutory "public interest" concept embodied in Section 204 of the Federal Power Act, is the FPC's far more technical responsibility to assure "just and reasonable" rates under Sections 205(a) and 206(a) of the Act. The latter requires economic and financial computation made on the basis of wholesale costs (J.A. 53). The Commission's ratemaking authority under Sections 205(a) and 206(a) does not give it authority to reduce rates, otherwise wholly justified on the basis of such costs, because of voluntarily depressed nonjurisdictional retail rates—extrinsic to the cost of providing the jurisdictional service. Wholesale rates must recover the cost of providing wholesale service, plus a reasonable return, and the costs incurred in providing such service do not become otherwise imprudent, improper or excessive because of allegations of anticompetitive conduct in unregulated matters.[28]

[28] In this connection we note that the discriminatory, depressed intrastate railroad rates in *Shreveport, supra*, although established by the Railroad Commission of Texas, were accepted and fully acquiesced in by the railroads "without more, at most, than a perfunctory protest." (see 205 F. 380, 386). However, totally absent from the Court' opinion is any intimation that the railroads' blithe acquiescence in depressed *intrastate* rates would permit imposition of a lower *interstate* rate than was otherwise just and reasonable. As the Court stated (234 U.S. at 355, 360):

"It is * * * clear that in removing the injurious discriminations against interstate traffic arising from the relation of intrastate to interstate rates, Congress is not bound to reduce the latter below what it may deem to [otherwise] be a proper standard * * *.

* * *

"So far as these interstate rates conformed to what was found to be reasonable by the Commission, the carriers are entitled to maintain them * * *."

In a related context involving the Interstate Commerce Commission's ratemaking authority, this Court recently concluded that while "the standards of the Act are broad enough to permit consideration of environmental factors * * *" (*Aberdeen & Rockfish R. Co.* v. *SCRAP*, 422 U.S. 289, 323, n. 21):

> * * * [S]tandard rate-making criteria limit the power of the ICC to force railroads to transport recyclable materials at deficit rates no matter how much the environment would be benefited thereby and no matter how much environmental injury would be caused by not doing so.

Moreover, in *Southern Pacific Co.* v. *ICC*, 219 U.S. 433, the Court held that in establishing just and reasonable rates under Section 15(1) of the Interstate Commerce Act, 49 U.S.C. 15(1), the analog of Section 206(a) of the Federal Power Act, the ICC would not reduce a railroad's requested rate increase, otherwise justified on the basis of costs, simply because the increased rate would destroy a business built up in reliance on the former rate. The Court held that the ICC's order was based on an assumption of powers that the

ICC did not have, 219 U.S. at 444. As Chief Justice White concluded for the Court (*ibid.* at 445):

> [T]he subject complained of was not the intrinsic unreasonableness of the new rate * * *, but the injury it was thought would be suffered from not continuing the old rate in force, an injury arising from circumstances extrinsic to the new rate; that is, a loss which would be suffered by substituting the higher rate, even if that rate was in and of itself reasonable and just.

2. While purporting to recognize the statutory factors which define and limit the Commission's ratemaking authority, the court below found sufficient "latitude" to permit the Commission to remedy a price squeeze by lowering the wholesale rate (Pet. App. 22a). The court argued that there is a "zone of reasonableness" and the Commission can "at the very least * * * put wholesale rates at the lower range of the zone of reasonableness when it finds anticompetitive conduct" (*ibid*). Unfortunately, the court of appeals has ignored the essential requirements of the Commission's ratemaking function and has imposed a totally inappropriate means of relief from the alleged price squeeze.

As this Court has often explained, the "zone of reasonableness" standard is simply a restatement of the doctrine of judicial deference to the expertise of an administrative agency. Accordingly, in *FPC* v. *Natural Gas Pipe Line Co.*, the Court stated that "there is a zone of reasonableness within which the Commission is free to fix a rate varying in amount and

higher than a confiscatory rate," [emphasis supplied] 315 U.S. 575, 585. Similarly, in *Permian Basin Area Rate Cases*, 390 U.S. 747, 767, the Court stated that reviewing courts "are without authority to set aside any rate selected by the Commission which is within the 'zone of reasonableness'".[29] Although the courts will defer to the Commission's rate determinations when they are within the "zone of reasonableness", the Commission's task is not so limited for it must also determine with as much exactness as possible the precise level appropriate for the rate in question.

As noted above, the Commission's specific responsibilities in establishing wholesale electric utility rates is to determine that rate which will permit the utility to provide adequate, reliable service at the least cost to the consumer while at the same time maintaining the utility's financial integrity.[30] Contested rates typically require lengthy and complex evidentiary hearings, wherein the record established is voluminous in size and requires detailed and exhaustive consideration by the Commission. In making its analysis the

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[29] See also, *Mobil Oil Corp.*, v. *FPC*, 417 U.S. 283, 307; *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 29; and *Placid Oil Co.* v. *FPC*, 483 F.2d 880, 889, n. 6 (C.A. 5).

The consequences of combining the above-quoted *Permian* standard and the test announced by the court of appeals are interesting. The FPC would first, without regard to the anti-competitive retail rate, determine the wholesale rate. Assuming that the FPC's determination was within the "zone of reasonableness", the courts would then necessarily defer to that rate provided the FPC would, as a second step, subtract from the rate some value related to the anti-competitive factor.

[30] *FPC* v. *Hope Natural Gas Co.*, *supra*, 320 U.S. 591, 605.

Commission does not locate a "zone of reasonableness" and then select a rate within that zone.[31] Rather, as Section 206(a) of the Power Act expressly states, the Commission must determine the single proper rate—"*the* just and reasonable rate" [emphasis supplied] required by Section 206(a)—on the basis of its assessment of the cost evidence.

In providing electric service a utility incurs a myriad of costs, which, to mention just a few, will include plant investment, fuel costs, labor and managerial expense, capital costs, depreciation, and taxes. As stated in *Mississippi River Fuel Corp.* v. *FPC,* 163 F.2d 433, 437 (C.A.D.C.):

> The regulated sales in this case, being the sales to utility companies for resale, are easily identified. The problem is to ascertain the costs incurred prerequisite to such sales, and so to be borne by those customers. *This is a question of fact. Expenses * * * are facts. They are to be ascertained, not created, by the regulatory authorities.* If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return

[31] In setting area rates for natural gas producers, the Commission customarily finds a range of reasonable rates and selects a rate within the range. See, *e.g., Placid Oil Co., et al.* v. *FPC,* 483 F.2d 880 (affirmed *sub nom. Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, *supra*). The "zone of reasonableness" in producer ratemaking exists because, given the lists of available data and methodology, the costing of natural gas production is necessarily somewhat imprecise, and because average costs, rather than individual company-by-company costs, are investigated. There is, for all practical purposes, no "zone of reasonableness" in electric utility ratemaking because precise data is available and rates are reviewed on a company-by-company basis.

> upon the investment, being an amount over and above expenses, would be a farce [emphasis supplied].

Thus, the typical controversy in a rate proceeding is not over valuation of these specific cost items, but whether specific items of known value may be properly recovered and by whom. Moreover, when, as in the present case, only part of the utility's business is regulated by the Commission, there must be a separation of the costs incurred in rendering jurisdictional service from those which are not.[32]

While the Commission must necessarily make judgments in resolving these matters, its judgments do not create a "zone of reasonableness". As stated above, expenses are facts "to be ascertained, not created, by regulatory authorities." Allegations concerning depressed, nonjurisdictional retail rates (Pet. App. 22a), have no relation to the cost of wholesale service. It would be simply irrational to disallow a legitimate item of cost, such as fuel expense, upon an allegation that the nonjurisdictional retail rate is set too low.

Moreover, even capital costs such as the cost of debt and preferred stock are essentially known and measurable expenses that must be ascertained in rate proceedings. Thus, the only "zone of reasonableness" which might be found in utility ratemaking is the range of potentially appropriate rates of return on common equity. But even here there is no opportunity

[32] *Panhandle Eastern Pipeline Co.* v. *FPC, supra,* 324 U.S. 635, 641.

to consider allegations of anticompetitive conduct because the Commission must make a cost analysis wherein it determines, for the specific utility involved, that rate of return on common equity which is commensurate with the risks associated with the investment, and which will be sufficient to maintain existing equity investment as well as attract new capital at reasonable costs.[33]

The standards governing rate of return are fully set forth in *Bluefield Waterworks & Improvements Co.* v. *Public Service Commission of West Virginia*, 262 U.S. 679:

> What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts. A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties * * *. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

[33] The Commission does permit any interested party to submit relevant evidence, including evidence of monopolization, which bears upon the risk associated with investment. *Pacific Gas & Electric Co.*, 52 F.P.C 385. Conway's allegations, however, were not of this kind; rather, it asked the Commission to determine the wholesale rate by reference to nonjurisdictional retail rates.

Similar to the *Bluefield* test is that announced in *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603, *supra:*

> * * * [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. * * * By that standard *the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.* [Emphasis supplied].

Hope requires the Commission to consider a variety of different sources of economic and financial data regarding the return on equity appropriate for a

given utility. As a basic guideline the Commission must measure the utility's financial record during previous years with that of similar utilities of comparable size and risk. This requires consideration of the utility's overall capital structure and earnings record during the period studied. Particular attention is paid to net operating income and earnings coverage for debt and preferred stock. Attention must also focus on previous trends in the utility's plant investment and operating expenses as well as anticipated future requirements under these categories. In this regard reference is made to expected growth in demand in the area served. The added cost of compliance with environmental regulations, inflationary pressures and regulatory lag also require consideration in determining the proper rate of return. Finally, the utility's earnings records must be compared to that of other industries with which the utility and the electric industry in general compete for investment capital.

While in reaching its conclusion the Commission must necessarily make judgments based on its accumulated expertise, the process is nevertheless one of determining with as much accuracy as possible the lowest cost of equity capital adequate for maintainng the utility's financial integrity and attracting needed capital. It would make no sense, and would indeed be impermissible, to ignore the cost of equity capital and impose a rate of return that fails to satisfy these criteria, because of allegations of price squeeze.

C. THE COMMISSION'S LACK OF AUTHORITY TO REMOVE THE DISCRIMINATION ALLEGED HERE DOES NOT IMPAIR RESPONDENTS' ACCESS TO A COMPLETE REMEDY.

The Commission's lack of authority to remedy the alleged price squeeze caused by the retail/wholesale rate differential does not create any regulatory gap or leave Conway without a complete remedy.[34] APLC's wholesale rates are regulated by the FPC, and allegations of anticompetitive conduct raised in the course of such proceedings will be fully addressed when they relate to matters within the scope of the Commission's jurisdiction and with respect to which the Commission has authority to grant appropriate relief.[35] Moreover, APLC's retail rates have been and will continue to be regulated by the Arkansas Public Service Commission.[36] Finally, the price squeeze alleged herein, assuming its existence despite recourse to the remedies referred to above, is cognizable in the federal courts. In this regard, Conway argues that the alleged price squeeze is in violation of the Sherman Act, 15 U.S.C.

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[34] Addressing this question in its initial brief below (p. 24), Conway stated that it "could not bring suit in the Federal District Court or State courts to recover their damages from the illegal price squeeze" because the Commission would "assert primary [or exclusive] jurisdiction in any [such] proceeding." However, Conway's concern is quite misplaced. While the Commission's jurisdiction is primary and exclusive in determining the proper level of wholesale rates, that in no way diminishes Conway's right or ability to seek judicial relief from a price squeeze resulting from voluntarily depressed retail rates (Pet. App. 22a–23a).

[35] See n. 27, *supra*, pp. 30–31.

[36] See n. 19, *supra*, pp. 22–23.

1, *et seq.*, and the Clayton Act, 15 U.S.C. 12, *et seq.* (J.A. 56). Conway has described APLC's conduct as follows:

> * * * a conscious, intentional effort on the part of AP&L to alter the historic relationship between wholesale and large industrial rates in such a fashion as to drive the publicly owned customers out of business as competitors for these desirable retail sales to new or expanded industrial loads, * * * [and] a further step toward the AP&L's goal of takeover of these customers.[37]

Enactment of the Federal Power Act did not immunize APLC's conduct from regulation under the antitrust laws.[38] Conway's allegations, if proven, would be in violation of the antitrust laws, specifically Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2, and subject to court injunction and other relief. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 436–438 (1945). Accordingly, there is no gap in regulation and Conway's rights are fully protected.

CONCLUSION

The decision of the court of appeals incorrectly holds that the Federal Power Commission has authority under the Federal Power Act to adjudicate claims concerning alleged anticompetitive retail rates which are not otherwise subject to the Commission's

[37] Conway's initial brief below, p. 9.

[38] *Cf. Otter Tail Power Co.* v. *United States, supra,* 410 U.S. at 374–75.

jurisdiction. That erroneous decision should be reversed.

Respectfully submitted,

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I authorize the filing of the above brief.
ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

APPENDIX

The Federal Power Act provides in pertinent part:

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SECTION 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States. [49 Stat. 847; 16 U.S.C. 824(a)]

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce, and to the sale of electric at wholesale in interstate commerce but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of elec-

tric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce or over facilities for the transmission of electric energy consumed wholly by the transmitter. [49 Stat. 847–848; 16 U.S.C. 824(b)]

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States. [49 Stat. 848; 16 U.S.C. 824(c)]

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale. [49 Stat. 848; 16 U.S.C. 824(d)]

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part. [49 Stat. 848; 16 U.S.C. 824(e)]

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 848; 16 U.S.C. 824(f)]

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner

affect or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851–852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such

schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824(e)]

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FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206 (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any transmission, or sale subject to the jurisdiction of the Commission, or that any rate, regulation, practice, or contract affecting such rate, charge, or classification in unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

(b) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy. [49 Stat. 852; 16 U.S.C. 824e(b)]

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